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ADMIRAL COVE DEVELOPMENT SDN BHD

v.

BALAKRISHNAN DEVARAJ & ANOR

B

FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF PCA
HASHIM YUSOFF FCJ
MOHD GHAZALI YUSOFF FCJ
[CIVIL APPEAL NO: 02(f)-10-2010 (W)]

C

29 APRIL 2011

CONTRACT: *Misrepresentation - Innocent misrepresentation - Relief of - Sale and purchase of property - Respondents rescinding agreement four years after receiving vacant possession - Whether representation induced*

D

respondents to enter agreement - Whether respondents had intention to affirm agreement - Conduct of respondents - Whether delay in rescinding agreement fatal - Whether innocent misrepresentation grounds to set aside executed contract - Sim Thong Realty Sdn Bhd v. Teh Kim Dar

E

CONTRACT: *Sale and purchase of property - Sale and purchase agreement - Misrepresentation - Respondents rescinding agreement four years after receiving vacant possession - Whether representation induced respondents to enter agreement - Whether respondents had intention to affirm agreement - Conduct of respondents - Whether delay in rescinding*

F

agreement fatal - Whether innocent misrepresentation grounds to set aside executed contract - Sim Thong Realty Sdn Bhd v. Teh Kim Dar

CONTRACT: *Rescission - Misrepresentation - Sale and purchase agreement - Respondents rescinding agreement four years after receiving vacant possession - Whether respondents had intention to affirm agreement*

G

- Conduct of respondents - Whether delay in rescinding agreement fatal - Whether rescission available for properly executed conveyance - Sim Thong Realty Sdn Bhd v. Teh Kim Dar

H

The respondents, who were purchasers of an apartment unit ('the property') which was developed by the appellant, had filed an action against the latter for misrepresentation. The respondents had entered into an agreement for the purchase of the property on 31 July 1995 ('the agreement') and vacant possession was delivered to them on 30 June 1998. Four years later, the

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respondents gave notice to the appellant that they were rescinding the agreement for misrepresentation. It was the respondents'

contention that at the launching of the appellant's project, the first respondent was shown a miniature model and a printed brochure showing *inter alia* a sandy beach front enabling the respondents to swim directly upon exiting their property. The respondents then averred that sometime in August 2002, they found that the said representations were false when they visited the property for the first time. The respondents sought a declaration that they had validly rescinded the agreement and claimed for damages and costs. The appellant, on the other hand, denied that there was any such misrepresentation and contended, *inter alia*, that the respondents were not entitled to rescind the agreement as the project had been completed at the time when the respondents sought to rescind, *viz*, four years after delivery of vacant possession of the property, and that they were also not entitled to the other reliefs sought. The learned judicial commissioner ruled that there was no actionable misrepresentation and hence dismissed the respondents' claim. The respondents appealed to the Court of Appeal wherein their appeal was allowed. Hence, the appellant appealed to this court wherein leave to appeal was granted on the following question of law: "What relief is applicable in a case of innocent misrepresentation?"

Held (allowing the appeal with costs)
Per Mohd Ghazali Yusoff FCJ delivering the judgment of the court:

(1) A representee who had been induced by an innocent misrepresentation may sue for rescission and consequent restitution but such remedy was not available so far as dealings in land are concerned where the conveyance had been properly executed by both vendor and purchaser. *(Sim Thong Realty Sdn Bhd v. Teh Kim Dar)* (refd) (paras 21 & 32)

(2) Since the conveyance had been properly executed by the appellant and the respondents, the latter could not recover the purchase monies. Further, there was a delay of more than four years before the respondents decided to pursue the action for rescission. Delay in pursuing an action for rescission of a contract could be fatal. So far as dealings on land are concerned, rescission on the ground of innocent misrepresentations will not be allowed after conveyance. Furthermore, innocent misrepresentation was not a ground for setting aside an executed contract. (paras 23, 24 & 27)

(3) The long lapse of time without complaint showed an intention to affirm the contract and was a strong indication that the respondents were not really persuaded by whatever was said by the appellant's servant or agent as alleged and hence did not amount to misrepresentation inducing the contract. Besides, the conduct of the respondents established on their part an election to affirm the agreement. (para 29)

(4) The transaction was fully completed and therefore, rescission could not be granted unless the misrepresentation was fraudulent. The finding of the learned judicial commissioner that the misrepresentation was innocent implied that it was not made recklessly careless of whether they were true or false. The word "innocent" is used in law to convey "not knowingly". Only a deliberate and intentional lie would justify a finding that the misrepresentation had been fraudulent. (para 30)

(5) The innocent misrepresentation complained of related to the physical state of the property, namely, its accessibility directly to the beach. There could not be a rescission of an executed contract where the misrepresentation related to the physical state. The conversation, if any, between the sales staff of the appellant and the first respondent did not amount to a misrepresentation inducing the contract. (para 31)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden, yang merupakan pembeli sebuah unit pangsapuri ('hartanah') yang telah dimajukan oleh perayu, telah memfailkan tindakan terhadap perayu bagi misrepresentasi. Responden-responden telah memasuki satu perjanjian bagi pembelian hartanah tersebut pada 31 Julai 1995 ('perjanjian') dan milikan kosong telah diberikan kepada mereka pada 30 Jun 1998. Empat tahun kemudian, responden-responden telah memberi notis kepada perayu bahawa mereka akan membatalkan perjanjian tersebut bagi misrepresentasi. Adalah hujahan responden-responden bahawa semasa pelancaran projek perayu, responden pertama telah ditunjukkan satu model miniature dan brocer bercetak menunjukkan *inter alia* laman pantai berpasir yang membolehkan responden-responden berenang terus apabila keluar daripada unit tersebut. Responden-responden menegaskan bahawa lebih kurang pada bulan Ogos 2002, mereka telah mendapati bahawa

representasi-representasi tersebut adalah palsu apabila mereka mengunjungi hartanah tersebut untuk pertama kali. Responden-responden telah kemudiannya memohon untuk satu deklarasi bahawa mereka telah membatalkan perjanjian dengan sah dan juga telah menuntut gantirugi dan kos. Perayu sebaliknya menafikan bahawa terdapat apa-apa misrepresentasi sebegitu dan berhujah, *inter alia*, bahawa responden-responden tidak berhak untuk membatalkan perjanjian tersebut memandangkan projek tersebut telah siap pada masa responden-responden membuat permohonan untuk pembatalan, iaitu, empat tahun selepas milikan kosong hartanah diberikan, dan mereka juga tidak berhak kepada relif-relif lain yang dipohon. Yang arif Pesuruhjaya Kehakiman memutuskan bahawa tiada tindakan undang-undang bagi misrepresentasi tersebut dan menolak tuntutan responden-responden. Responden-responden telah merayu kepada Mahkamah Rayuan di mana rayuan mereka dibenarkan. Oleh itu, perayu telah merayu ke mahkamah ini di mana kebenaran merayu telah dibenarkan atas soalan undang-undang berikut: "Apakah relif yang boleh digunapakai dalam kes misrepresentasi ikhlas?"

Diputuskan (membenarkan rayuan dengan kos)
Oleh Mohd Ghazali Yusoff HMP menyampaikan penghakiman mahkamah:

(1) Seorang representee yang telah didorong oleh misrepresentasi ikhlas boleh mendakwa untuk pembatalan dan restitusi yang mengikutinya tetapi remedi sebegini tidak boleh didapati bagi pengendalian berkenaan tanah di mana urusan perpindahan hakmilik tanah telah pun disempurnakan oleh kedua-dua penjual dan pembeli *(Sim Thong Realty Sdn Bhd v. Teh Kim Dar)* (dirujuk).

(2) Memandangkan urusan perpindahan hakmilik tanah telah pun disempurnakan dengan baik oleh perayu dan responden-responden, responden-responden tidak boleh menuntut kembali wang belian. Lagi pun, terdapat kelambatan lebih daripada empat tahun sebelum responden-responden membuat keputusan untuk mengambil tindakan bagi pembatalan. Kelambatan mengambil tindakan untuk pembatalan sesuatu kontrak boleh menjadi fatal. Bagi pengendalian berkenaan hal tanah, pembatalan berdasarkan alasan misrepresentasi ikhlas tidak akan dibenarkan selepas perpindahan hakmilik tanah. Tambahan lagi, misrepresentasi ikhlas bukanlah satu alasan untuk mengenepikan kontrak yang telah disempurnakan.

(3) Jangka masa panjang tanpa aduan menunjukkan niat untuk mengesahkan kontrak dan indikasi kuat bahawa mereka tidak didorong oleh apa-apa yang telah dinyatakan oleh pekerja atau wakil perayu seperti yang didakwa dan oleh itu, ianya tidak membawa kepada misrepresentasi yang telah mendorong kontrak. Di samping itu, kelakuan responden-responden telah membuktikan pilihan mereka untuk mengesahkan perjanjian.

(4) Transaksi telah diselesaikan dengan penuh dan oleh itu, pembatalan tidak boleh dibenarkan kecuali misrepresentasi adalah secara fraud. Penemuan yang arif Pesuruhjaya Kehakiman bahawa misrepresentasi adalah ikhlas menunjukkan bahawa ianya tidak dibuat dengan cuai tanpa berhati-hati sama ada ianya benar atau palsu. Perkataan "ikhlas" adalah digunakan di dalam undang-undang untuk menunjukkan "tanpa menyedari". Hanya satu penipuan yang sengaja dan berniat akan membuktikan penemuan bahawa misrepresentasi adalah secara fraud.

(5) Misrepresentasi ikhlas yang diadukan adalah berkenaan keadaan fizikal hartanah, iaitu, akses terus ke pantai. Tidak boleh adanya pembatalan kontrak yang telah disempurnakan di mana misrepresentasi adalah berhubung dengan keadaan fizikal. Perbualan, jika ada, di antara staf jualan perayu dan responden pertama tidak membawa kepada misrepresentasi yang telah mendorong kontrak.

Case(s) referred to:

Heilbut, Symons & Co v. Buckleton [1913] AC 30 ***(refd)***
Leaf v. International Galleries [1950] 2 KB 86 ***(refd)***
Oscar Chess Ltd v. Williams [1957] 1 All ER 325 ***(refd)***
Sim Thong Realty Sdn Bhd v. Teh Kim Dar [2003] 3 CLJ 227 CA ***(refd)***
Wilde and Another v. Gibson [1843-60] All ER Rep 494 ***(refd)***

For the appellant/defendant - Lambert Rasa-Ratnam (Andrew Chiew with him); M/s Lee Hishammuddin & Partners
For the respondents/plaintiffs - SL Tan; M/s SL Tan & Assoc

[Appeal from Court of Appeal, Civil Appeal No: W-02-883-2006]]

[Editor's note: For the Court of Appeal judgment, please see Balakrishnan Devaraj & Anor v. Admiral Cove Development Sdn Bhd [2010] 7 CLJ 152.]

Reported by Kumitha Abdul Majid

JUDGMENT

Mohd Ghazali Yusoff FCJ:

[1] On 5 July 2010, this court granted the appellant (the defendant in the originating action) leave to appeal on the following question of law:

What relief is applicable in a case of innocent misrepresentation?

The Background

[2] The appellant is the developer of Marina Bay Condominium in Port Dickson, Negeri Sembilan (hereafter referred to as "the project"). The respondents (the plaintiffs in the originating action) are the purchasers of a unit, namely, an apartment in the project (hereafter referred to as "the property"). The respondents entered into an agreement for the purchase of the property on 31 July 1995 (hereafter referred to as "the agreement"). The respondents have viewed a miniature model of the project displayed at the launching of the project at Shangri-La Hotel, Kuala Lumpur on 13 May 1995.

[3] Vacant possession was delivered to the respondents on 30 June 1998. The respondents put the property up for sale after delivery of vacant possession. Nothing happened until about four years later when solicitors for the respondents gave notice by letter dated 31 October 2002 intimating that the respondents are rescinding the agreement for misrepresentation.

[4] On 14 February 2003, the respondents filed this action against the appellant for misrepresentation and sought a declaration that the respondents had validly rescinded the agreement. They also sought damages and costs.

[5] In their claim, the respondents averred, *inter alia*, that at the launching of the project:

(a) the first respondent was shown by a servant or agent of the appellant a miniature model and a printed brochure of the proposed project "showing a sandy beach front, umbrellas, relaxing easy chairs and sail boats close to the beach"; and

(b) the appellant's servant or agent represented to the first respondent that the respondents "will be able to swim directly upon exiting the said unit".

[6] The respondents then averred that they found out that the aforesaid representations were false sometime in August 2002 when they visited the property for the first time and discovered, *inter alia*, the following:

(a) a wall was erected "right across the sea fronting" of the property;

(b) "rocks, stones and boulders all along the front of the sea" outside the property;

(c) "sewerage discharge being led off visibly into the sea" in front of the property; and

(d) that the wall and rocks have affected the respondents' "enjoyment of the aforesaid unit by reason of the diminish[ed] aesthetic and/or environmental conditions arising out of the seating and positioning of the wall and rocks".

[7] The respondents contended that as a consequence of the above, they suffered loss and expense and prayed for, *inter alia*, a declaration that the agreement was properly rescinded, the return of a sum of RM505,313.27 and damages for misrepresentation. The said sum of RM505,313.27 was the total expenditure incurred by the respondents including, *inter alia*, the purchase price of the property, interest paid towards a bank loan, payments for utilities, covered car-park charges, legal fees, an Admiral Marina Club membership and several miscellaneous items.

[8] In opposing the claim, the appellant denied that there was any such misrepresentation and contended, *inter alia*, that the respondents were not entitled to rescind the agreement as the project had been completed at the time when the respondents sought to rescind, *viz*., four years after delivery of vacant possession of the property, and that they were not entitled to the other reliefs sought.

[9] After full trial in the High Court, the learned judicial commissioner ruled that there was no actionable misrepresentation and hence dismissed the respondents' claim. She found that on the evidence adduced before her, the representation was not made out and, in any case, did not induce the respondents to enter into the agreement. She also held that as the contract has been completed, the court could not order rescission.

[10] In her grounds of judgment the learned judicial commissioner referred to *Sim Thong Realty Sdn Bhd v. Teh Kim Dar* [2003] 3 CLJ 227 and said: A

> Even if I were to agree that there was such representation, the present case would have failed the test adopted by the Appeal Court in Sim Thong. That is the test of whether the representation has resulted in something different than what it was. A land without road access road is completely useless, but not a condominium without direct beach or sea access. Direct accessibility to the sea or beach is not as fundamental as accessibility to the road. As such even if there were representations made it did not result in the condominium becoming worthless. B C

[11] At the trial, the 1st respondent testified that he had seen a miniature model of the said project at the appellant's office when he went there to make enquiries and that there was also a similar model at the project site in Port Dickson which showed that the condominium has direct access to the beach. In relation to this the learned judicial commissioner said: D

> The silent miniature model in this case is innocent of such representation. It cannot amount to an assertive representation on the part of the defendant. (See also *Dato' Soo Lai Sing v. Kumpulan Sierramas (M) Sdn Bhd & Anor* [2004] 3 MLJ 546). As such I find that the plaintiff has failed to establish assertive representation on the part of the defendant. Whilst I agree with all the above cited cases that brochures or advertisements can amount to representation, it is indeed dependent on the facts of each ease. Whether or not brochures and advertisement or a miniature model amount to representation will depend on how assertive they are and whether a reasonable man can be induced by it. E F G
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> The miniature model of the defendant in this case does not have the kind of fanfare about accessibility to [the] beach. It is completely silent on such feature though it highlighted the feature that all units are facing the sea including living rooms and all bedrooms. The miniature model is hardly assertive of such representation alleged by the plaintiffs. It all remains as a silent model with no such assertion. H

[12] At the end of the day, the learned judicial commissioner made the following conclusion: I

> To sum up, it is my finding that there was no assertive representation by the defendant on 'directly accessible to the sandy beach and the sea' either by the miniature model or the defendant's agent or representative. Even if there was the plaintiff[s] has not discharged the burden of proving that he has relied upon such misrepresentation. As there was no actionable misrepresentation proved, I dismissed the claim of the plaintiff[s] with costs.

The respondents appealed.

Judgment Of The Court Of Appeal

[13] The Court of Appeal allowed the appeal with costs "here and below" and set aside the decision of the trial court and made the following orders:

(a) a declaration that the respondents have validly rescinded the agreement;

(b) the return of the sum of RM505,313.27;

(c) damages for misrepresentation to be assessed by the trial court; and

(d) interest on the sum of RM505,313.27 at 8% per annum from the date of judgment to the date of realisation.

[14] On the issue of delay on the part of the respondents in rescinding the agreement, the Court of Appeal was of the view that it was not fatal and ruled that "any lapse of time does not constitute delay in exercising the right of election". In delivering the judgment of the court, Abdul Malik Ishak JCA said:

> The trial court's finding that the first plaintiff was not induced by the representation because the first plaintiff had already intended to sell his condominium unit at the time of delivery of vacant possession even before verifying direct accessibility to the beach was certainly misplaced. The trial court failed to judicially appreciate the fact that the plaintiff was too sick to travel with his family to visit his condominium unit and that he had never occupied the condominium unit ever since vacant possession was given to him by the defendant. It was only in August 2002 that the first plaintiff together with his wife and daughter visited their condominium unit.

It is our firm judgment that the defendant made representations which were false and which, being material, did induce the first plaintiff to pay the earnest deposit of RM5,000.00 and eventually induced the plaintiffs to sign the sale and purchase agreement for a condominium unit with the defendant and, consequently, upon discovering the falsity of the representations the plaintiffs were entitled to rescind the contract and also entitled to recover the monies from the defendant. *Restitutio in integrum* is still possible.

[15] On the law, Abdul Malik Ishak JCA said:

The law is quite clear. Section 19(1) of the Contracts Act 1950 enacts that a misrepresentation, whether innocent or fraudulent, would entitle the innocent party to rescind the contract. The explanation to section 19(1) of the Contracts Act 1950 enacts the common law requirement that the misrepresentation must induce the contract. In the instant appeal, the facts showed that the misrepresentation induced the first plaintiff to enter into the contract with his wife on the one hand and with the defendant on the other hand. Thus, in our judgment, *prima facie* the plaintiffs would be entitled to avoid the contract unless it fell within the Exception to section 19(1) of the Contracts Act 1950. It is not necessary for us to deal with the Exception because it is no part of the defendant's pleaded case that the plaintiffs were not entitled to rescind the sale and purchase agreement on the ground that the plaintiffs had not "the means of discovering the truth with ordinary diligence" – to use the all too familiar statutory formula.

Misrepresentation of the sandy beaches and accessibility to it were pleaded by the plaintiffs. They were entitled to rescind the sale and purchase agreement and for the return of the sum of RM505,313.27 as pleaded in the Statement of Claim.

Rescission of the sale and purchase agreement is the best remedy if there has been a misstatement or misrepresentation of material facts, by the representor to the representee, with the intention and effect of inducing the representee to enter into the sale and purchase agreement.

Judgment Of This Court

[16] In the instant appeal the respondents claimed that the appellant had represented that the respondents "will be able to swim directly upon exiting the said unit" but that representation was false due to the presence of a wall and "rocks, stone and boulders all along the front of sea side" outside the respondents'

A unit. The respondents did not however plead that the false representation was made fraudulently or negligently. Premised upon this, it is clear that the respondents' pleaded case for misrepresentation is one of innocent misrepresentation.

B **[17]** What is innocent misrepresentation? According to *Osborne's Concise Law Dictionary* (8th edn) an innocent misrepresentation is one made with reasonable grounds for believing it to be true, as where an honest mistake is made. It is also stated that when a person has been induced to enter into a contract by
C misrepresentation he may, *inter alia*, affirm the contract and insist on the misrepresentation being made good, if that is possible or rescind the contract if it is still executory, and if all parties can be restored to their original positions.

D **[18]** In *Sim Thong Realty Sdn Bhd, supra*, the facts showed that the plaintiff, as vendor, sought to enforce an agreement for the sale and purchase of land against the defendant, the purchaser. The defendant sought to avoid the agreement for misrepresentation. The defendant claimed that the plaintiff's agent, one Wong, had
E misrepresented that the said land had access to the main road when in fact there was no such access. The trial judge gave judgment in favour of the plaintiff on the ground that as the availability of access was not incorporated into the agreement, it was no longer open to the defendant to complain about the said
F lack of access. The defendant appealed to the Court of Appeal. In allowing the appeal, Gopal Sri Ram JCA (as he then was) said (at p. 238):

> Now, it is trite that the expression "misrepresentation" is merely descriptive of a false pre-contractual statement "that induces a
G contract or other transaction. But it does not reflect the state of mind of the representor at the relevant time. The state of mind of the representor at that time he made the representation to the representee varies according to the circumstances of each case. It may be fraudulent. It may be negligent. Or it may be entirely
H innocent, that is to say, the product of a mind that is free of deceit and inadvertence. See, *Abdul Razak bin Datuk Abu Samah v. Shah Alam Properties Sdn Bhd* ([1999] 3 CLJ 231). Put another way, a misrepresentation is innocent "where the representor believes his assertion to be true and consequently has no intention of deceiving the representee." (Cheshire & Fifoot, *Law of Contract*,
I 6th edn.) It is the particular state of mind of the representor that

determines the nature of the remedy available to the representee. So, if the misrepresentation is made fraudulently, then the representee is entitled to rescission and all damages directly flowing from the fraudulent inducement.

[19] At pp. 240-242, the learned judge said:

In the case of an innocent misrepresentation, our law is the same as that of England before the passing of the Misrepresentation Act 1967 in that country. **A representee who has been induced by an innocent representation may sue for rescission and consequent restitution; but he may not recover damages.** This principle is based on the historical antecedent that a Court of Equity will only decree specific relief but not damages, the latter being the sole relief that Courts of Common Law will grant. (emphasis added)

There is a world of difference between the two remedies, namely, an indemnity, or more appropriately, restitution (see, Goff & Jones, *The Law of Restitution,* 5th edn, p. 287, fn. 48) and an award of damages for misrepresentation. That difference is dealt with in the 6th edn of Cheshire and Fifoot on the *Law of Contract* (p. 240) from which we quote:

> The overriding rule that damages are irrecoverable for an innocent misrepresentation forming no part of the contract has led, however, to a somewhat subtle distinction between indemnity and damages. There is no right in the plaintiff to have the *status quo* restored *in toto*; no right to an indemnity against every obligation that he may have incurred as a result of the contract. Otherwise there would be no difference between indemnity and damages. In the words of Bowen, LJ (in *Newbigging v. Adam* [1886] 34 Ch D 582, 594):
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> > I should not like to lay down the proposition that, a person is to be restored to the position which he held before the misrepresentation was made, nor that the person injured must be indemnified against loss which arises out of the contract, unless you place on the words "out of the contract" the limited and special meaning which I have endeavoured to shadow forth. Loss arising out of the contract is a term which would be too wide. It would embrace damages at common law, because damages at common law are only given upon the supposition that they are damages which would naturally and reasonably follow from the injury done.

> To what obligations, then, does the indemnity relate? The answer is that the plaintiff must be indemnified, not against all obligations even though they may be correctly described as having arisen under, or out of or as a result of the contract, but only against those necessarily created by the contract. (Authors' emphasis). The burden must be one that has passed to the representee as a necessary and inevitable result of the position which he assumed upon completion of the contract.
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> If for example, A. procures the dissolution of his partnership with B and C on the ground of innocent misrepresentation, he nevertheless remains personally liable for partnership debts contracted while he was a member of the firm. His position as partner was created by the contract and it is the inevitable and automatic result of having occupied this position that he is now burdened with liability for debts. Hence they are a proper subject for an indemnity.
>
> It follows that the victim of an innocent misrepresentation is not to be put in exactly the same position as if the representation had never been made. For, that would in an award of damages. All that is required is that the representee be returned to his position only so far as with regards to the rights and obligations which have been created by the contract into which he was induced to enter. The interface of the remedies for rescission and restitution produces this result.

[20] In *Oscar Chess Ltd v. Williams* [1957] 1 All ER 325, Lord Denning made reference to the ruling of Holt CJ in *Heilbut, Symons & Co v. Buckleton* [1913] AC 30 with regard to the distinction between a term of the contract and a statement which is only an innocent misrepresentation; Lord Denning said (at p. 328):

> The material distinction here is between a statement which is a term of the contract and a statement which is only an innocent misrepresentation. This distinction is best expressed by the ruling of Holt CJ, 'Was it intended as a warranty or not?', using the word 'warranty' there in its ordinary English meaning: because it gives the exact shade of meaning that is required. It is something to which a man must be taken to bind himself.
>
> In applying this test, however, some misunderstanding has arisen by the use of the word 'intended'. It is sometimes supposed that the tribunal must look into the minds of the parties to see what

> they themselves intended. That is a mistake. Lord Moulton made it quite clear in *Heilbut, Symons & Co v. Buckleton* ([1913] AC at p. 51), that 'The intention of the parties can only be deduced from the totality of the evidence ...'. The question whether a warranty was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice. And this, when the facts are not in dispute, is a question of law.

[21] The question of law posed in the instant appeal is "what relief is applicable in a case of innocent misrepresentation". We would echo the words of the learned judge in *Sim Thong Realty Sdn Bhd* that the legal position in Malaysia is that a representee who has been induced by an innocent misrepresentation may sue for rescission and consequent restitution. But we would also add that a representee in such circumstances may only rescind the contract if it is still executory and if all parties can be restored to their original position. Our view would be in tangent with the judgment of the Court of Appeal in *Sim Thong Realty Sdn Bhd* where the learned judge concluded as follows:

> It is clear that the defendant's pleaded case alleges neither fraud nor negligence. All that the defendant has pleaded is the misrepresentation about the access to the land. Absent a specific and particularised plea of fraud or negligence, the defendant must be taken as asserting a case of innocent misrepresentation in the sense already discussed.
>
> In its pleaded case, the defendant has sought, *inter alia*, the following relief, namely, (i) rescission (ii) return of the deposit of RM254,204 (iii) interest on the sum of RM254,204 and (iv) damages.
>
> Applying the principles discussed earlier to the facts of the present instance, it is our judgment that the defendant is entitled only to rescission and to the return of the deposit of RM254,204. These are the two items that would replace the defendant in its position – to borrow the words of Bowen LJ – "so far as regards the rights and obligations which have been created by the contract into which (it) has been induced to enter". The defendant is not entitled to interest on the sum of RM254,204. To award interest would amount to compensating the defendant for the loss of the use of his money while it was in the plaintiff's hands. This, in our view, would amount to an award of damages.

[22] We would reiterate that the legal position in Malaysia is that a representee who has been induced by an innocent misrepresentation may sue for rescission and consequent restitution. Be that as it may, there are authorities which seems to suggest that to rescind a contract may be rather a drastic step, particularly where the contract has been performed. In such a scenario, the right to rescind could be lost.

[23] In the instant appeal, it is a case of a contract for the purchase and sale of property and the contract was completed when the purchaser, ie, the respondents received an executed conveyance and made payment for the purchase price. Since the conveyance has been properly executed by both the appellant and the respondents, we do not think that the latter can recover the purchase monies. Further, there was a delay of more than four years before the respondents decided to pursue the action for rescission. A case on point, with regard to delay, is *Leaf v. International Galleries* [1950] 2 KB 86. The facts of the case were that in March 1944, the buyer bought from the sellers an oil painting of Salisbury Cathedral which was represented to him as a painting by Constable, a representation which was held to be one of the terms of the contract. In 1949 he found that the picture was not a Constable. The buyer then claimed for the rescission of the contract on the ground that there had been an innocent misrepresentation. The court held that the claim was not competent because the buyer had lost the right to reject on that ground that there was a five years delay when he claimed for the rescission and that was unreasonable. In his judgment, Jenkins, LJ said (at pp. 695-696):

> So far as dealings on land are concerned there is a considerable body of authority to the effect that rescission on the ground of innocent misrepresentation will not be allowed after conveyance. For instance, there are the observations (1 HL Cas. 632) of Lord Campbell to that effect in *Wilde v. Gibson* ([1848] 1 HL Cas. 605), and the doctrine has also been applied to leases in *Angel v. Jay* ([1911] 1 KB 666). *In some of the cases, on the strength of the authorities dealing with sales of land, the proposition has been stated in general terms to the effect that no executed contract can be rescinded after completion on the ground of innocent misrepresentation.* As appears from the recent decision of the majority of this court in *Solle v. Butcher* ([1949] 2 All ER 1107) it seems probable that the

proposition thus generally stated is unduly wide. In particular, it cannot be assumed that it necessarily holds good with respect to a sale of chattels passing by delivery. For the purposes of this case, however, I find it unnecessary to decide how far it is possible to obtain, on the ground of innocent misrepresentation, rescission of a contract for the sale of chattels passing by delivery after the contract has been completed by delivery of those chattels, and I propose to confine myself to considering whether, assuming such a claim to be open, this is a case in which it should properly be allowed. In my judgment, that question must clearly be answered in the negative on the facts. It is true that the buyer bought the picture on the faith of the representation, innocently made, that it was a painting by Constable. It is true that this was a representation of great importance which went to the root of the contract and induced him to buy. Clearly if, before he had taken delivery of the picture, he had obtained other advice and come to the conclusion that the picture was not a Constable, it would have been open to him to rescind. It may be that if, having taken delivery of the picture on the faith of the representation, he, within a reasonable time, took other advice and satisfied himself that it was not a Constable, he might have been able to make good his claim to rescission notwithstanding the delivery. That point I propose to leave open. In fact, he took delivery of the picture, kept it for some five years, and took no steps to obtain any further evidence as to its authorship, and, finally, when he was minded to sell the picture at the end of a matter of five years, the untruth of the representation was brought to light.

In those circumstances it seems to me to be out of the question that a court of equity should grant relief by way of rescission. It is true that the county court judge held that there had been no laches, and, of course, it may be said that the buyer had no occasion to obtain any further evidence as to the authorship of the picture until he wanted to sell, but, in my judgment, contracts such as this cannot be kept open and subject to the possibility of rescission indefinitely. Assuming that acceptance of delivery was not fatal to his claim, at all events, I think it behoves the buyer either to verify, or, as the case may be, disprove, the representation within a reasonable time or else to stand or fall by the representation. If he is allowed to wait five, ten or twenty years and then re-open the bargain, there can be no finality. I do not think that equity will intervene in such a case, more especially in the present case as it cannot be said that, apart from rescission, the buyer would have been without remedy. The judge was clearly of opinion, and it seems to me that he was right, that the

A representation that the picture was a Constable amounted to a warranty. If it amounted to a warranty and that was broken, as on the findings of the judge it was, the buyer had a right at law to damages for breach of warranty. That remedy he did not choose to exercise. That being so, it seems to me that he has no
B justification now for coming to equity five years after the event and claiming rescission. Accordingly, it seems to me that this is not a case in which the equitable remedy of rescission, assuming it to be available in the absence of fraud in respect of a completed sale of chattels, should be allowed to the buyer. For these reasons, I agree that the appeal fails and should be dismissed.
C (emphasis added)

[24] We are of a similar view. We would agree that delay in pursuing an action for the rescission of a contract could be fatal. More importantly, the above judgment of Jenkins LJ pointed out
D that so far as dealings on land are concerned, there is a considerable body of authority to the effect that rescission on the ground of innocent misrepresentation will not be allowed after conveyance. In *Wilde and Another v. Gibson* [1843-60] All ER Rep 494, a case which was referred to by Jenkins LJ in his judgment
E when making reference to sales of land, Lord Campbell said (at p. 502):

If there be, in any way whatever, misrepresentation or concealment which is material to the purchaser, a court of equity will not compel him to complete the purchase, but where the
F conveyance has been executed, I apprehend, my Lords, that a court of equity will set aside the conveyance only on the ground of actual fraud. *There would be no safety for the transactions of mankind if, upon a discovery being made at any distance of time of a material fact not disclosed to the purchaser of which the vendor had merely constructive notice, a conveyance which had been executed could*
G *be set aside.* (emphasis added)

[25] On the facts of the instant appeal, we find it difficult, if not impossible, to affirm the ruling of the Court of Appeal that delay on the part of the respondents in pursuing the action for
H rescission of the agreement was not fatal and that "any lapse of time does not constitute delay in exercising the right of election". We are of the unanimous view that the Court of Appeal did not properly appreciate the facts and the applicable law when it set aside the decision of the learned judicial commissioner. If at all the
I appellant had represented that the respondents "will be able to swim directly upon exiting the said unit" as claimed by them, we

are of the view that this would be a situation where a statement was made which did not amount to a promise. Such a statement is often treated as being "outside" the contract.

[26] There is a flaw in the conclusion of facts and on the law reached by the Court of Appeal. The Court of Appeal failed to appreciate that rescission of a contract after execution cannot be had for mere innocent misrepresentation unless it renders the subject of the sale different from what was contracted for. It further failed to note that the property did not differ so completely in substance from what the respondents intended to acquire.

[27] We do not think that the sale and purchase agreement for the property in the instant appeal can be set aside for innocent misrepresentation after it has been completed by conveyance and payment of the purchase money. On the part of the appellant as vendor, it had conveyed the property with a good title and has delivered up actual possession or enjoyment thereof. The respondents as purchasers had accepted the conveyance of the property by taking possession and paying the price. Innocent misrepresentation is no ground for setting aside an executed contract. What has been performed is what was agreed to be performed.

[28] The facts showed that after accepting the keys to the property, the respondents commenced paying the necessary charges payable when one purchases a unit in a condominium, eg, covered car-park charges, fire insurance premium, basic furnishing package, service charges and sinking fund deposit, payments due to Indah Water and assessment due to the Majlis Perbandaran Port Dickson. They even paid for the Admiral Marina Club membership amounting to RM14,000 and the ancillary charges payable thereto. These payments totalled RM505,313.27 which was the sum that they claimed from the appellant including the club membership as loss and expense as "the said unit cannot be used and lost its purpose for which the plaintiffs purchased the same".

[29] We are of the view that such conduct of the respondents discussed above established on their part an election to affirm the agreement. The long lapse of time without complaint showed an intention to affirm the contract and is a strong indication that they were not really persuaded by whatever was said by the appellant's

servant or agent as alleged and hence did not amount to misrepresentation inducing the contract. They even had the temerity to join the Admiral Marina Club which we would have thought was an optional thing and has nothing to do with the agreement. Further, they even wanted to sell the property after vacant possession was granted which would suggest that they had viewed the property much earlier as opposed to their claim that they only visited the property for the first time in August 2002. We also noted that the respondents never introduced any evidence to show that the first respondent was unwell after vacant possession was granted, ie, on 30 June 1998 and consequently was unable to travel to Port Dickson to visit the property. The property was purchased in their joint names and no reason was canvassed as to why the second respondent was also unable to visit the property after vacant possession was granted. That being the position, we would say that the claim by the first respondent that he was not well and did not visit the said property until August 2002 when he made certain discoveries about access to the beach, a claim which the Court of Appeal paid great attention thereto and consequently sought to assail the decision of the learned judicial commissioner by ruling that she failed to "judicially appreciate the fact" he was "too sick to travel", has no bearing upon the respondents' case and would be irrelevant as the property had by then been transferred and the agreement was completed.

[30] On the whole we are of the unanimous view that it is clear that the agreement was executed (as opposed to the position in Sim Tong Realty Sdn Bhd where the transaction was never completed) and that in equity, rescission for innocent misrepresentation is not an available remedy under such circumstances. The transaction was a fully completed one and therefore rescission cannot be granted unless the misrepresentation was fraudulent. The respondents clearly did not plead fraud. The finding of the learned judicial commissioner that the misrepresentation was innocent implies that it was not made recklessly careless of whether they were true or false. The word "innocent" is used in law to convey "not knowingly". Only a deliberate and intentional lie would justify a finding that the misrepresentation had been fraudulent.

[31] There could be no rescission of an executed contract for innocent misrepresentation. The respondents had elected to affirm the agreement. The innocent misrepresentation complained of related to the physical state of the property, namely, its accessibility directly to the beach. There could not be a rescission of an executed contract where the misrepresentation related to the physical state. The conversation, if any, between the sale staff of the appellant and the first respondent did not amount to a misrepresentation inducing the contract.

[32] We would answer the question of law posed in this appeal as follows: generally a representee who has been induced by an innocent misrepresentation may sue for rescission and consequent restitution but such remedy is not available so far as dealings in land are concerned where the conveyance has been properly executed by both vendor and purchaser.

[33] For the reasons aforesaid we allow this appeal with costs here and below and we set aside all orders of the Court of Appeal and reinstate the decision of the trial court.

[34] After hearing counsel for the parties, we ordered that the respondents pay costs in the sum of RM50,000 to the appellant. We also ordered that the deposit be refunded to the appellant.